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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1485

FRED DE MAIO,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Fred DeMaio, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on January 14, 1970.

OPINIONS BELOW

The judgment of conviction and sentence of the United States District Court for the Northern District of Illinois is not officially reported. The opinion of the United States Court of Appeals for the Seventh Circuit entered on January 14, 1970, has not yet been officially reported. It is attached as an appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence on count three (the substantive count), but reversing the judgment of conviction and sentence on count one (the conspiracy count) was entered on January 14, 1970. A Petition for Rehearing En Banc was timely filed* on February 11, 1970, and denied on March 27, 1970.** The jurisdiction of this Court is invoked under and pursuant 28 U.S.C. 1254 (1).

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*Petitioner applied for and was granted an extension of time to file his Petition for a Rehearing.

**The certified copy of the record filed herewith includes the opinion, the judgment order, the Petition for Rehearing, the order denying the same, the appendix and the briefs filed by the parties below. The original record of proceedings in the District Court was filed in this Court along with a Petition for Certiorari filed by co-defendants Braico and Routa, O.T., 1970, Misc. No. 1887.

QUESTIONS PRESENTED

1. Whether admission of a co-defendant's out-of-court statements prejudicial to petitioner constituted reversible error where the conspiracy charge upon which their admission was predicated was not proven.

2. Whether there was an improper joinder of offenses and defendants contrary to Rules 8 and 14 of the Federal Rules of Criminal Procedure.

(a) Whether joinder of petitioner with co-defendants not shown to have been involved in a "common scheme or plan," and not shown to have participated in the same "act or transaction" constituted reversible error.

(b) Whether, when it became apparent that no conspiracy had been proven, failure to grant petitioner's motion for severance constituted reversible error.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

"No person shall be . . . deprived of life, liberty, or property, without due process of law. . ."

Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

RULES INVOLVED

Federal Rules of Criminal Procedure, Rule 8:

(a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common sceme or plan.

(b) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Federal Rules of Criminal Procedure, Rule 14:

RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT

Petitioner DeMaio was named in a four count indictment along with co-defendants Lawrence Braico, Ronald Routa and Richard Fernandez. Count one charged all four defendants and unindicted co-conspirator Owen Garland with violating the general conspiracy statute (18 U.S.C. 371) by conspiring with each other to violate 18 U.S.C. 2315 (by receiving the proceeds from a robbery of a jewelry store committed by co-defendant Fernandez and unindicted co-conspirator Garland). Count two charged co-defendant Fernandez alone with transporting the stolen jewelry in interstate commerce in violation of 18 U.S.C. 2314. Count three charged petitioner DeMaio alone with violating 18 U.S.C. 2315 by purchasing part of the jewelry stolen by Fernandez and Garland. Count four charged co-defendants Braico and Routa alone with violating 18 U.S.C. 2315 by purchasing part of the same jewelry. (R. 2, A. 8-11).* Co-defendant Fernandez entered a plea of guilty and along with unindicated co-conspirator Garland, was a government witness.

Prior to trial, petitioner and the remaining two defendants (Braico and Routa) moved to dismiss count one on the ground that the alleged conspiracy was improperly charged.

Petitioner further moved, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, for a severance from co-defendants Braico and Routa and a separate trial on

*As used herein, "A" designates the Appendix filed on behalf of Petitioner in the Court of Appeals. "R" designates the common law record.

the substantive charge (count three). (A. 11-12, 21, 52, R. 6, 21) These motions were denied. .

Following the government's opening statement, petitioner again moved to dismiss the conspiracy count, which motion was denied. .(Tr. 17-19)*

At the close of the government's case, petitioner moved for judgment of acquittal on the charge of conspiracy. This motion was denied and the case was allowed to go to the jury with the instruction that the jury disregard all limitations previously imposed upon the evidence and consider all of the evidence against all of the defendants. (R. 87). The jury returned a verdict of guilty on all counts of the indictment.

On appeal, judgment of conviction on the conspiracy count was reversed by tht Court of Appeals as to all defendants on the grounds that no conspiracy had been proven. Judgments of conviction on the substantive counts were affirmed.

THE EVIDENCE

The evidence adduced at the trial, largely through the testimony of the thieves Fernandez and Garland, showed that on August 2, 1967, Fernandez and Garland robbed a jewelry store in Bettendorf, Iowa and brought the jewelry to Chicago in search of a buyer or buyers. Although Fernandez first told the F.B.I. during an interview in January of 1968 that he had sold all of the jewelry to Braico (Tr. 21-22, A. 14-15, R. 75) at the trial Fernandez and

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*As used herein, "Tr." designates the transcript of trial proceedings.

Garland both testified that they first contacted the petitioner and on the evening of August 3, 1967 went to his home. They testified he purchased approximately one-third of the jewelry for $2,200.

Although Fernandez and Garland had previously told the prosecutor and F.B.I. agents and only a few weeks prior to the trial Garland had testified under oath before the grand jury that DeMaio paid them $600 that evening and agreed to pay the remaining $1,600 the following day (A. 24, Tr. 231-32; A. 34, Tr. 560-67), they both testified at the trial that petitioner paid them $1,600 at that time and arranged to meet them the following day outside of Buddy's Lounge where he would pay him the remaining amount of $600. (A. 18-19, Tr. 82-83)

Fernandez and Garland further testified they then attempted to contact co-defendant Braico, but were unsuccesful and left a message for him to meet them the following day in Buddy's Lounge (A. 19, Tr. 87).

Garland's mother testified that on August 3, 1967, her son paid her $200 he owed her and she gave him government exhibit 4 as a receipt. (A. 28) Caroline Rybicki, Garland's ex-wife, testified that on the same day Garland paid her $200 and she gave him government exhibit 45 as a receipt. (A. 27-28, Tr. 334-38). A secretary for a lawyer testified that Garland also paid her $200 on the morning of August 4, 1967. (A. 35, Tr. 631-35)

On the night of August 3, 1967, after leaving Buddy's Tavern Fernandez and Garland, who were driving a stolen car, were stopped by the police. (A. 30, Tr. 417-19) Garland testified that he was ticketed for driving with a fictitious license and rode to the police station in a police car where he made bond. (A. 30, Tr. 417-19) Fernandez, driving the stolen car, followed but made a turn and returned

to the Dunes Motel. The police officer who arrested Garland testified that he had been offered a bribe by Garland but did not accept it. (A. 35-36, Tr. 648-49) Both Fernandez and Garland denied that there had been any bribe or offer of a bribe and said that the police officers had not searched the trunk, where the stolen jewelry was located, because Garland had demanded a search warrant. (A. 24-25, Tr. 256-257) It was stipulated however that Mr. Hartigan, the prosecutor, whose trial preparation notes had been obtained pursuant to 18 U.S.C. §3500, if called as a witness would testify that he understood from his interview with Fernandez immediately preceding the trial that Garland had attempted to bribe the police officer and that he wrote down the words "tried to bribe him." (A. 39-40, Tr. 821-22) Fernandez, however, also denied that he told Hartigan of the bribe attempt. (A. 24, Tr. 252)

The following day, testified Fernandez and Garland, they met petitioner outside of Buddy's Lounge and were paid the remainder of the money he owed them.

Then, as prearranged the previous evening (with Braico not petitioner, there being no evidence petitioner knew of the contact with co-defendants Braico and Routa), they entered Buddy's Lounge to wait for Braico. A short time later, Braico and Routa entered and Fernandez asked Braico if he could get rid of some jewelry. The four individuals then went to an apartment on Cicero Avenue and Addison in Chicago. After some time, Braico asked Fernandez and Garland why they had not told them they had sold part of the load to petitioner and said they were having trouble getting rid of the remainder because petitioner had "put the word out" that he could get the remainder of the jewelry for $3,500. Repeated objections to this testimony by counsel for petitioner were overruled. (A. 20-21, Tr. 97-90)

Later, over objection by petitioner, the witness Garland testified to substantially the same conversation. Petitioner's motion for a mistrial was denied. (A. 31-32, Tr. 440-46)

Braico then told Fernandez and Garland to leave the jewelry and meet him later in Buddy's Lounge. (A. 20-21) Braico and Routa substquently met Fernandez and Garland at Buddy's Lounge and paid them $4,500 for the remainder of the jewelry.

Fernandez admitted to having been convicted of four felonies. (A. 17) He further admitted to the pendency against him of several felony charges including one in the United States District Court for the Northern District of Illinois. (A. 17-18) Armed robbery charges were pending against him in DuPage and Cook counties. He did not know whether there was an armed robbery charge pending against him in Ohio because he thought the warrants were "dropped" (A. 22). At the time of trial Fernandez was serving a five year sentence and was incarcerated in the DuPage County Jail. At the time of the alleged offense he admitted to earning his living by stealing. (A. 17-18)

Garland had also been convicted of four felonies, including three armed robberies. (A. 29) There were three felonies pending against him. (A. 32-33) At the time of the trial he was serving a fifteen year sentence and was also jailed in the DuPage County Jail. (A. 29)

Fernandez testified that he had talked to the F.B.I. on several occasions, beginning in January, 1968, when he was in the DuPage County Jail on a state charge. (A. 22) He requested the agents' help in getting him into federal custody. (A. 24) He first told them about the Iowa robbery referred to in the indictments on January 29, 1968. At that time he told Agents Walters and Buckingham in some de-

tail that he and Garland sold all of the jewelry to the co-defendant Braico (A. 22)*

REASONS FOR GRANTING THE WRIT

1. Admission Of A Co-Defendant's Out-Of-Court Statements Prejudicial To Petitioner Constituted Error Where The Conspiracy Charge Upon Which Their Admission Into Evidence Was Predicated Was Not Proven.

Petitioner DeMaio respectfully submits that admission in evidence against him—without the attendant right of confrontation—of a co-defendant's statement that petitioner purchased part of the jewelry (the substantive crime for which petitioner was charged) and offered to purchase the remander, was prejudicial and requires reversal of the conviction on the substantive count where the conspiracy charge upon which admission of the prejudicial testimony was predicated was not proven. *Bruton* v. *United States,* 391 U.S. 123 (1968), *Schaffer* v. *United States,* 362 U.S. 511 (1960).

This case presents a significant variation related to the issue last ruled upon in *Schaffer* v. *United States,* 362 U.S. 511 (1960), of whether the judgment of conviction on a substantive count may be affirmed where a charge of conspiracy is not proven, which charge justified the admission of co-defendant's statements.

In *Schaffer,* this Court, with four justices dissenting, held that failure of proof of conspiracy under circumstances there presented did not require reversal on the substantive counts of which petitioners were convicted.

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*Although petitioner had moved prior to trial for production of any evidence favorable to the accused, this statement was suppressed by the government until after Fernandez had testified at the trial. (A. 14-15, R. 75)

Importantly, however, in *Schaffer*: (1) Petitioners did not move for severance until after failure of proof of the conspiracy charged; and (2) Most significantly, the district court granted petitioner's motion for judgment of acquittal on the conspiracy count and meticulously instructed the jury to consider the evidence separately as to each defendant. (In the instant case the jury was allowed — indeed directed—to consider all of the evidence as against each defendant on the conspiracy count, much of which would have been inadmissible but for the charge of conspiracy.) Finally, the *Shaffer* court did not have the benefit of this Court's subsequent decision in *Bruton* v. *United States,* 391 U.S. 123 (1968) but, rather, was still governed by the rule of *Delli Paoli* v. *United States,* 352 U.S. 232 (1955) (overruled by *Bruton*).

The prejudicial and not-subject-to-confrontation testimony developed as follows. Early in the trial the prosecutor offered, through witnesses Fernandez and Garland, testimony as to out of court conversations of co-defendants Braico and Routa. Recognizing the inadmissibility of this testimony as against petitioner absent proof of conspiracy, this testimony was initially offered only as against Braico and Routa and not as against petitioner. (Tr. 96-97, 439) The court, appreciating the inadmissible and potentially prejudicial nature of the testimony, instructed the jury that the testimony should be considered as against Braico and Routa only "at this time." (Tr. 96-97, 439)

Over objection by petitioner, the witness Fernandez testified co-defendant Braico had inquired of Fernandez and Garland:

> "Why didn't you tell me that you had sold part of the load to Frank Diamond?" (This was a name used to refer to petitioner) (A. 20-21)

Over objection by counsel for petitioner, Fernandez was allowed to continue his narrative of the conversations with and statements of the co-defendants:

> And he said, "That's why we are having trouble getting rid of the load because Frank Diamond had put the word——to who I didn't know, but some other people.
>
> He told me that Frank had put the word out that he could get the load for $3,500 and that it had messed us up a little with some other people, and he told us he had called someone else and that they would be coming over later. (A. 21)

Later, again over petitioner's objection, the witness Garland testified to the same conversation and the same out-of court statement of the co-defendants. Petitioner's motion for a mistrial was denied. (A. 31-32)

Petitioner submits that where the government joins defendants by means of a charge of conspiracy, and the jury is allowed to hear (indeed to consider) evidence not otherwise admissible against a defendant, and the conspiracy is not proven, reversal must result on the substantive count. This is particularly so where, as here, the inadmissible evidence purports to be direct evidence of guilt in the form of an otherwise inadmissible statement of a co-defendant (who did not testify) which implicated petitioner. *Bruton* v. *United States,* 391 U.S. 123 (1968).

The extrajudicial "testimony" of co-defendant Braico, given through witnesses Fernandez and Garland, was only admissible against DeMaio if the conspiracy had been proven—a fact fully appreciated by the trial judge in making his evidentiary rulings. However, it must follow that since no conspiracy was proven, its admission at a joint trial, even assuming proper limiting instructions, violated the rule of *Bruton* v. *United States,* 391 U.S. 123 (1968).

In *Bruton* this Court held admission of Evan's (a co-defendant) confession which implicated *Bruton* was reversible error. The Court said:

> ". . . because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans confession in a joint trial violated petitioner's right of cross examination secured by the Confrontation Clause of the Sixth Amendment." *Bruton* v. *United States,* 391 U.S. 123, 126.

Similarly in the instant case the extrajudicial statements of co-defendant Braico to Fernandez and Garland implicated DeMaio. Had no conspiracy been charged, this evidence surely would have been inadmissible against DeMaio, as recognized by both the government and court when they were initially admitted "at this time" as to Braico and Routa only. Accordingly, since no conspiracy was proven, it *remained* inadmissible, just as Evans' confession in *Bruton remained* inadmissible and petitioner's Sixth Amendment right of confrontation was violated.

Importantly, the prejudice to defendant petitioner was, we suggest, even more severe than in *Bruton.* In *Bruton* the prejudicial testimony was admitted *with limiting instructions.* In the instant case, while the testimony was orginally offered and admitted against co-defendants Braico and Routa only, the court later, on motion of the government, instructed the jury to disregard the limitations previously imposed and consider all of the evidence against all of the defendants. (R. 87) Thus, not only was there a violation of *Bruton* but the violation was compounded and defendant was prejudiced beyond any cure by the court's instruction to the effect that the jury should

consider the inadmissible and prejudicial evidence as against petitioner.*

The significance of failure of the trial court to grant petitioner's motion for judgment of acquittal and of its subsequent instruction to the jury to consider all of the evidence against all of the defendants is best appreciated by a reading of *Schaffer*.

In *Schaffer*, unlike the instant case, the trial court granted defendant's motion for judgment of acquittal on the charge of conspiracy and the case was submitted to the jury on the substantive charges only. As specifically noted by this Court, the trial court, in submitting the remainder of the case,

> "meticulously set out separately the evidence as to each of the petitioners and admonished the jury that they were 'not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant.' " *Schaffer* v. *United States*, 362 U.S. 511, 515.

The crucial fact in the instant case therefore is whether the jury could and did ignore the highly prejudicial matter admissible on the conspiracy count alone in deciding petitioners' guilt on the substantive offense charged. In view of this Court's recent decision in *Bruton* v. *United States*, 391 U.S. 123 (1968), it is respectfully submitted that the jury could not and did not make such a distinction and petitioner respectfully requests this court grant

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*Although the instruction indicated that the inadmissible evidence should be considered only as to count one, the jury surely could not follow such a limiting instruction. Failure to find defendants not guilty of conspiracy, in the face of a total absence of proof, is evidence enough of the jury's inability to limit the testimony to count one.

certiorari to consider the application and meaning of *Bruton* to the facts as developed in the instant case—namely the effect upon the substantive conviction where the jury is allowed to hear and consider evidence highly prejudicial and admitted solely upon the basis upon an unproven conspiracy charge.

Petitioner respectfully urges that, upon full consideration and proper application of this Court's decisions in *Schaffer* and *Bruton*, the petition should, in the posture of this case, be granted, and the judgment of the Court of Appeals affirming the conviction on the substantive count should be reversed..

2. Improper Joinder And Trial Of Offenses And Defendants Contrary To Rules 8 And 14 Of The Federal Rules Of Criminal Procedure Requires Reversal.

(a) There was a misjoinder of offenses and defendants because the indictment did not properly charge a conspiracy because it failed to allege "a common scheme or plan" or participation in the same "act or transaction."

Petitioner urges joinder of petitioner and his alleged offense with co-defendants Braico and Routa and their alleged offense violated Rule 8 of the Federal Rules of Criminal Procedure which allows joinder of offenses only where they constitute part of a ". . . common scheme or plan" (Rule 8(a)) and joinder of defendants only ". . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." (Rule 8(b)).*

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*Prior to trial petitioner moved to dismiss the conspiracy count and for severance from co-defendants Braico and Routa on the grounds that no conspiracy was *properly*

Counts two, three and four of the indictment charged wholly *separate and distinct* offenses against separate and distinct defendants. Accordingly, joinder of petitioner with co-defendants Braico and Routa was necessarily predicated and totally dependent upon the proper *allegation* and *proof* of a conspiracy involving Braico and Routa with petitioner. Except in wholly conclusory terms, the indictment failed to allege any ". . . common scheme or plan" involving petitioner with co-defendants Braico and Routa, but rather, charged two separate and distinct offenses by petitioner (count three) and Braico and Routa (count four). Clearly, the separate purchases of jewelry were not charged to have been part of a common scheme or plan involving petitioner with co-defendants Braico and Routa. The conspiracy count could thus not have been properly predicated upon joinder of offenses. (Rule 8(a))

Similarly, the conspiracy count failed to allege, except in wholly conclusory terms, that petitioner and co-defendants Braico and Routa participated in the ". . . same act or transaction or in the same series of acts or transactions." Quite to the contrary, the conspiracy count, which incorporated by reference as overt acts the offenses charged in counts two, three and four, charged *similar* but completely *separate and distinct* acts and transactions by and between (a) petitioner (count three) and (b) Braico and Routa (count four) and the sellers of the jewelry. The conspiracy count could not thus have been properly predicated upon joinder of defendants. (Rule 8(b))

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charged. The motion here relied upon was made by co-defendants Braico and Routa (A. 11-12, R. 6) and as joined in by petitioner was denied. R. 52, 59) Petitioner also filed separate motions to dismiss and for severance which were likewise denied.

Apparently the conspiracy count was predicated upon the erroneous and rejected assumption that separate and distinct offenses (purchases) by separate and distinct defendants (purchasers of stolen property) may be joined in a single indictment by means of alleging a general and conclusory allegation predicated upon nothing more than the fact that separate and distinct purchases were made by separate and distinct buyers from a single seller (or as here sellers). In other words, the indictment is necessarily predicated upon the assumption that separate buyers of stolen property may be linked in a conspiracy with each other through dealing with a common seller.

This contention is wholly without merit. For that matter, there need not be, as was the circumstance here, any conspiratorial relationship between a buyer and his seller—no less between separate, distinct and unrelated buyers. The Court of Appeals in *United States* v. *Ford*, 324 F. 2d 950 (7th Cir. 1963)* held that absent a ". . . prior or contemporaneous arrangement beyond the mere sales agreement" (*United States* v. *Ford*, 324 F. 2d 950, 952), buyers and sellers are not conspirators. In reaffirming the position taken in *Ford*, the Court later held in *United States* v. *Varelli*, that buyers and sellers "cannot be *charged*" with conspiracy by merely alleging a buyer-seller relationship. (*United States* v. *Varelli*, 401 F. 2d 735, 748 (emphasis supplied) It necessarily and even more obviously follows that unrelated buyers can not be charged with a conspiracy by merely alleging a common seller (or sellers).

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* *Ford* was cited and relied upon by petitioner and his co-defendants in their motion to dismiss the indictment and for severance. (A. 11-13)

To summarize, the indictment did not properly charge a conspiracy and therefore joinder of offenses and defendants was improper because it failed to allege:

(a) A "common scheme or plan" or involvement in the same "act or transaction" (beyond the mere sales agreement separate and distinct from the agreement with Braico and Routa) between petitioner and the sellers Fernandez and Garland;

(b) A "common scheme or plan" or involvement in the same "act or transaction" (beyond the mere sales agreement separate and distinct from the agreement with petitioner) between Braico and Routa and the sellers Fernandez and Garland;

(c) A "common scheme or plan", or involvement in the same "act or transaction" (or any relationship whatsoever) by or among petitioner and co-defendants Braico and Routa.

Importantly, the rules of joinder and severance of offenses and defendants were designed for the protection of defendants as well as the convenience of the government. It is suggested, however, that, inclusion of the wholly conclusory conspiracy count—having as its only common denominator the separate and distinct offenses by separate and distinct defendants charged in counts two, three and four of the indictment—was for the sole purpose of circumventing Rule 8 of the Federal Rules of Criminal Procedure and solely for the convenience of the government's proof of certain evidence common to both cases, or possibly to permit the government, as it did in this case, to expose the jury to evidence otherwise inadmissable against a co-defendant.

Incident to this argument—i.e., that a conspiracy was not properly charged—it is important to note that the Court of Appeals finessed, or more euphimistically, avoided the issue by observing:

> "Because it is clear that no conspiracy was proved, we need not consider the alternative contention that the indictment did not properly charge a conspiracy." (App., p. 28)

It is respectfully urged that this observation misses the point of petitioner's argument. The argument that a conspiracy was not properly charged was directed not so much at the conspiracy count itself as it was directed at showing the government's failure to allege (in the present posture of the case it is clear they did not prove) a common scheme or plan or participation in the same act or transaction justifying joinder of defendants. Having failed to allege a common scheme or plan or participation in the same act or transaction, there was no justification to join in the same indictment petitioner and his offense with his co-defendants and their offenses. Accordingly, failure of the court to grant petitioner's pre-trial motion to dismiss the conspiracy count and grant relief from prejudicial joinder was reversible error.

The controlling rule and authorities governing joinder of defendants are particularly well set forth in an opinion by Chief Justice (then circuit Judge) Burger in *Ward* v. *United States,* 289 F. 2d 877 (D.C. Cir. 1961), where in holding that the trial court erroneously denied Ward's pre-trial motion for severance, Chief Justice Burger said:

> "The government contends that Lyon's acquittal on count 7 demonstrates that Ward did not suffer prejudice by joinder. But "where multiple defendants are charged with offenses in no way connected, and are tried together, they are preju-

> diced by that very fact and *the trial judge has no discretion to deny relief.' Ingram* v. *United States,* 4 Cir. 1959. See also *Schaffer* v. *United States,* 1960, 362 U.S. 511 80, S. Ct. 945, 4 L. Ed. 921; *McElroy* v. *United States,* 1896, 164 U.S. 72, 17 S. Ct.31, 41 L. Ed. 355 . . ." (emphasis supplied) *Ward* v. *United States,* 289 F. 2d 877, 878.

For the reason that the conspiracy count failed to properly charge a "common scheme or plan" or participation in the same "act or transaction," failure to grant petitioner's pre-trial motion to dismiss the conspiracy count and grant petitioner a separate trial was reversible error.

(b) Failure to grant petitioner's motion for severance when it appeared that there was a failure of proof of the conspiracy charged upon which joinder of defendants was predicated was reversible error.

It is apparent in a reading of the record and the decision of the Court of Appeals that no conspiracy was proven to have existed between petitioner and his co-defendants. For that matter the government, to its credit although somewhat belatedly, conceded this point in the Court of Appeals (Brief for Appellee p. 9)*—a concession

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* The Government's arguments relative to the instant issue were captioned "The Conspiracy was properly charged" and "Failure of Proof as to the conspiracy count does not require reversal." It was not contended that the conspiracy charged was proven. Interestingly, the government did argue that a conspiracy was properly charged, but curiously *did not* address itself to the issues raised herein and relied upon below, but rather to a totally different argument made by co-defendants Braico and Routa

which, unfortunately, came too late to protect petitioner from the ". . . powerfully incriminating extrajudicial statements of a co-defendant who [stood] accused side by side with the defendant, [and which were] deliberately spread before the jury in a joint trial" predicated up an unproven charge of conspiracy.** *Bruton* v. *United States,* 391 U.S. 123, 135-6). In the present posture of the case, it is clear petitioner was in no way involved with co-defendants Braico and Routa in any "common scheme or plan" or "in the same act or transaction."

Even assuming *arguendo,* however, that a conspiracy had been properly charged, failure of the court to grant defendant's motions for a judgment of acquittal and a severance once it became apparent that no conspiracy was *proven* was reversible error.

Petitioner relies principally upon a joint reading of *Schaffer* v. *United States,* 362 U.S. 511 (1960) and *Bruton* v. *United States,* 391 U.S. 123 (1968).

As noted above, in *Schaffer,* this Court, with four justices dissenting, held that failure of proof did not necessarily require reversal of the substantive counts upon

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—namely failure to allege that the goods had moved in interstate commerce. (Brief for Appellee, pp. 5-7)

** Indeed in the instant case the government's attempt to take advantage of the "windfall" of the co-defendant's incriminating statements is more egregious than in the *Bruton*-type situation, for at least in *Bruton* and similar cases the initial joinder is proper. Alternative procedures, of course, were available. For example, the court might have examined the evidence prior to trial to determine whether there was a *prima facie* case of conspiracy or concert of action, as was done recently in *United States* v. *Zentgraf,* 7 Cr. L. Rptr. 2003 (N.D. Cal. March 15, 1970).

which petitioners were convicted. Importantly, however, in the instant case three very significant and it is suggested controlling distinguishing factors exist:

1. In *Schaffer*, unlike the instant case, as the majority opinion took pains to point out, "The propriety of joinder prior to failure of proof of conspiracy was not assailed." *(Schaffer* v. *United States,* 362 U.S. 511, 515). The facts of the instant case are in sharp contrast. Petitioner attacked the sufficiency of the conspiracy charge and moved for trial separate from co-defendants Braico and Routa prior to trial, correctly anticipating that there would not and could not under the indictment be proof of conspiracy, and citing as grounds the very same case *(United States* v. *Ford,* 324 F. 2d 950) ultimately relied upon by the Court of Appeals in reversing judgment of conviction on the conspiracy count. (A. 11-12, R. 6). Further, at the close of the government's opening statement to the jury, petitioners again moved to dismiss the conspiracy count and again brought to the court's attention the case of *United States* v. *Ford.* Finally at the close of the government's case, a similar motion was made and denied. As emphasized in *Schaffer,* as if speaking directly to the circumstances here present:

> "We emphasize, that, in such a situation, the trial judge has the continuing duty at all stages of the trial to grant a severance if prejudice does appear, and where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice."
>
> *Schaffer* v. *United States,* 362 U.S. 511, 516

2. Of far greater significance as respects the facts of the instant case, *Schaffer,* unlike the instant case and as already pointed out in point one above, the *trial court* (not the Court of Appeals) granted petitioner's motion for a judgment of acquittal on the conspiracy charge and "... meticulously set out separately the evidence" (*Schaffer* v. *United States,* 362 U.S. 511, 516), thus protecting petitioners and the jury from the unfortunate situation which resulted in this case. Contrast the circumstances of the instant case where jury was instructed at the close of the government's case to and indeed did consider all of the evidence together—including the damning extrajudicial statement admitted in violation of *Bruton*—as against petitioner.

3. This Court in *Schaffer* did not have the benefit of the Court's decision in *Bruton* where this Court accorded significance to the 1966 Amendments to Rule 14 of the Federal Rules of Criminal Procedure which bear directly on the issue now presented to this Court. See *Bruton* v. *United States,* 391 U.S. 123, 132-32. The observations there made are equally appropriate to inadmissible out-of-court statements such as that of Braico in the instant case and to conspiracy prosecutions.

One final observation is appropriate and, unfortunately, necessary in anticipation of the government's brief in opposition to this petition. As is evident from an examination and comparison of the briefs filed below with the opinion of the Court of Appeals, petitioner's arguments were given most cursory consideration. Without citing the relevant cases relied upon or discussing the evidence, the court summarily concluded that "joinder was . . . not prejudicial" and that the evidence—largely the thoroughly discredited, contradictory and bias-motivated testimony of

two thieves—was "unusually clear".* Petitioner respectfully suggests that the lower court's conclusions are totolly belied by the record and indeed by failure of the Court of Appeals to set forth its reasoning or adequately to distinguish or even cite the decision of this Court in *Bruton* or its own previous decisions in *United States* v. *Guajardo-Melendez,* 401 F. 2d 35 (1968) and *United States* v. *Gordon,* 253 F. 2d 177 (7th Cir. 1958), relied upon by petitioner below. In short, petitioner's contentions received unjustifiably short shrift. Petitioner respectfully requests full review by this Court.

For the reasons urged herein, it is respectfully submitted that failure of the Court to grant petitioner's motion for acquittal on the conspiracy count and for trial separate from co-defendants Braico and Routa was and is reversible error and it is requested that this Court grant the petition and reverse the judgment of the Court of Appeals affirming petitioner's conviction on the substantive count.

CONCLUSION

As is already apparent, the *Bruton* case has had and continues to have far-reaching effect upon the trial of federal criminal cases. Of significant importance among the numerous issues raised in the wake of *Bruton* is the effect of failure of proof of a charged conspiracy upon the

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* Although the Court of Appeals did not cite this case, it apparently was relying upon the decision of this Court in *Harrington* v. *California,* 395 U.S. 250 (1969). See Reply of Defendant-Appellant to Answer to Petition for Rehearing, pp. 5-7 for an argument distinguishing *Harrington* from the instant facts.

conviction obtained upon a substantive charge where, as here, there was admission of evidence prejudicial to and inadmissible against petitioner which, but for the ill-advised and unproven charge of conspiracy, would never have reached the jury. Petitioner urges that in the peculiar fact circumstances of the instant and similar cases proper application of *Bruton* and the Federal Rules of Criminal Procedure requires reversal.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969 — SEPTEMBER SESSION, 1969

Nos| 17298, 17364
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
LAWRENCE BRAICO and
RONALD ROUTA,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
FRED DeMAIO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 14, 1970

Before KNOCH, *Senior Circuit Judge,* KERNER, *Circuit Judge,* and GORDON, *District Judge.*

GORDON, *District Judge.** This is an appeal from convictions entered against the three appellants. The charges stem from the sale in Chicago of goods stolen in Iowa.

Two of the appellants, Mr. Braico and Mr. Routa, were convicted of violating 18 U.S.C. § 2315 by receiving stolen

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*The writer of this opinion is sitting by designation from the district court for the Eastern District of Wisconsin.

property; the third appellant, Mr. DeMaio, was convicted of the same crime, but he was charged in a separate count of the indictment. In addition, all of the appellants, together with Mr. Fernandez, a seller of the stolen property, were convicted of violating 18 U.S.C. § 371, by conspiring to violate § 2315.

The appellants contend that the conspiracy was not properly charged or proved. While it is not denied that Mr. Braico and Mr. Routa were properly joined as defendants, it is urged that the joinder of those two with Mr. DeMaio was error. The appellants contend that this alleged misjoinder prejudiced each of them.

I. THE CONSPIRACY COUNT

The evidence showed that on August 2, 1967, two men, Mr. Fernandez and Mr. Garland, robbed a jewelry store in Bettendorf, Iowa. Afterward, they went to Chicago where they sought a buyer for the stolen goods. Mr. DeMaio bought approximately one-third of the goods for $2,200; he offered to pay $3,500 for the rest, but this offer was declined.

They then contacted the defendants, Mr. Braico and Mr. Routa, and offered to sell them the remaining goods for $4,500. After Mr. Braico and Mr. Routa had made inquiries among acquaintances to whom they might resell the goods, they advised Mr. Fernandez and Mr. Garland that it would be difficult to resell the goods if they paid $4,500 because "Johnny Diamond" [sic] (who was identified at the trial as Mr. DeMaio) had "put out the word" that he could get the remaining goods for $3,500. However, after further bargaining, they purchased the goods for $4,500.

No evidence was adduced at the trial as to any agreement existing at any time among all three of the appel-

lants. No evidence was adduced that any of the three had had any understanding with Mr. Fernandez or with Mr. Garland prior to or contemporaneous with the robbery. These were unrelated purchases of the stolen goods by the appellants, and such transactions do not reflect a conspiracy in the absence of proof of an agreement as to this transaction or as to some other concert of action. *United States* v. *Ford,* 324 F. 2d 950, 952 (7th Cir. 1963).

In *United States* v. *Varelli,* 407 F. 2d 735, 748 (7th Cir. (1969), Judge Kerner, writing for this court, observed that certain named defendants

> ". . . were all involved with the *distribution* of merchandise stolen in interstate commerce. None of these parties were involved with the *theft* of either the Polaroid equipment or the silver shipments. The relation of buyer and seller even with knowledge of the character of the goods being sold is insufficient to make the buyer a conspirator."

Because it is clear that no conspiracy was proved, we need not consider the alternative contention of the appellants that the indictment did not properly charge a conspiracy.

The government does not seriously challenge the appellants' contention that there was inadequate proof to support the conspiracy conviction. However, the government urges that the absence of proof as to a conspiracy does not require reversal of the convictions upon the substantive counts of the indictment.

II. THE SUBSTANTIVE COUNTS

The appellants point to a number of rulings made by the trial court in connection with the receipt of evidence, which, it is claimed, constituted prejudicial error because

of the total absence of proof to support the conspiracy count. We have carefully examined each of these specific instances and conclude that the joinder of Mr. DeMaio with Mr. Braico and Mr. Routa was not prejudicial to any of them, notwithstanding the want of evidence regarding a conspiracy.

In *Varelli,* cited above, this court observed, at p. 748, that even when a conspiracy had not been proved, it is possible to affirm convictions on the substantive counts "where the evidence is overwhelming." Our examination of the present record persuades us that the evidence as to each defendant's guilt was unusually clear; we believe that the jury was not confused by the existence of the conspiracy count or by the presentation of the proof in a joint trial. See *Kotteakos* v. *United States,* 328 U.S. 750, 765 (1946) and *United States* v. *Levi,* 177 F. 2d 827 (7th Cir. 1949), mod. 177 F. 2d 833 (7th Cir. 1949). Cf. *United States* v. *Reed,* 376 F. 2d 226 (7th Cir. 1967).

III. THE GRAND JURY PROCEEDINGS

The appellants ask the court to reverse the convictions on the ground that only hearsay evidence was considered by the grand jury. Appellants draw this conclusion from the fact that each of the government witnesses who testified at the trial responded negatively when asked whether he had appeared before the grand jury which returned this indictment.

The appellants charge that only hearsay evidence was offered to the grand jury in order that the prosecution could avoid its obligations under *United States* v. *Amabile,* 395 F. 2d 47 (7th Cir. 1968); in that ruling this court noted that a defendant is entitled to examine the grand jury testimony of a witness at the trial in order to attempt

to impeach such witness. See *United States* v. *Borelli*, 336 F. 2d 376, 391 (2d Cir. 1964).

In our opinion, the record does not establish the accuracy of the appellant's charge that only hearsay evidence was presented to the grand jury. However, even if that contention were correct, we note that the appellants do not suggest that there was an absence of probable cause before the grand jury. The law permits probable cause to be based on hearsay evidence. *Costello* v. *United States*, 350 U.S. 359, 363 (1956): *United States* v. *Sternback*, 402 F. 2d 353, 356-7 (7th Cir. 1968).

We are mindful of the judicial expressions emanating from the second circuit which are critical of the practice of presenting only hearsay evidence before a grand jury when better evidence is available. See, for example, *United States* v. *Arcuri*, 405 F. 2d 691 (2d Cir. 1968). The prosecutor in the appeal before this court has asserted that, as a matter of policy, primary evidence is not withheld from the grand jury. In our opinion, the record does not establish that an abuse occurred in the case at bar.

IV. CONCLUSION

In view of the absence of proof establishing the existence of a conspiracy, the conviction of count I of the indictment is reversed as to all appellants. The conviction of the defendant, Fred DeMaio, on the substantive count numbered III of the indictment is affirmed, and the conviction of the defendants, Lawrence Braico and Ronald Routa, on the substantive numbered count IV of the indictment is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.